

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**

|                                      |   |                                      |
|--------------------------------------|---|--------------------------------------|
| <b>UNITED STATES OF AMERICA,</b>     | : |                                      |
|                                      | : |                                      |
| <b>v.</b>                            | : | <b>Criminal Case No. 1:15CR00201</b> |
|                                      | : |                                      |
| <b>EDWIN STUART LIVINGSTON, III,</b> | : |                                      |
| <b>RONALD JOSEPH TIPA,</b>           | : |                                      |
| <b>THOMAS EDWARD TAYLOR, and</b>     | : |                                      |
| <b>ROSS BERNARD DEBLOIS, SR.,</b>    | : |                                      |
|                                      | : |                                      |
| <b>Defendants.</b>                   | : |                                      |

**DEFENDANTS' MOTION FOR ENTRY OF DISCOVERY ORDER**

Defendants, through counsel, respectfully move the Court to enter the attached Proposed Discovery Order. The government has been investigating this multi-defendant case for seven years and has produced 8.4 terabytes of discovery. As detailed below, in order to effectively prepare for trial, the defendants request an order directing the government to disclose Rule 16(a) material and Jencks/*Giglio* material at least sixty (60) days before trial, and Rule 404(b) evidence no later than February 15, 2016. Hearing on this motion is waived.

**BACKGROUND**

During a telephone conference among the parties, the government proposed seeking what it described as a "standard" discovery order, which would require the government to provide Rule 16(a) material and Rule 404(b) evidence seven days before trial and Jencks/*Giglio* material five days before trial. The defendants were not opposed to a discovery order, but took the position that the deadlines proposed by the government would not provide adequate time to prepare for trial in light of the volume of discovery and the scope of the government's

investigation and would present unnecessary case management issues. The parties were unable to agree upon a discovery schedule.

On November 16, 2015, the government tacked on a request for entry of a discovery order in a response to the defendants' motion to compel. (ECF Nos. 56, 56-1). The defendants briefly noted their opposition to the proposal in their reply brief and requested an opportunity to further brief the issue under applicable rules. (ECF No. 59). On November 20, 2015, the court granted the parties 14 days to further brief this issue. *See* Hr'g Tr. 26:25-27:1; 30:20-23.

## **ARGUMENT**

### **I. THE GOVERNMENT'S PROPOSED DISCOVERY ORDER DOES NOT PROVIDE THE DEFENDANTS SUFFICIENT NOTICE TO EFFECTIVELY PREPARE FOR TRIAL**

The government has produced over eight terabytes of discovery stemming from a seven year investigation involving dozens of individuals. The discovery order proposed by the government gives the defendants mere days to review this massive amount of discovery for evidence in response to the government's disclosures, conduct necessary investigations, and engage in the motion practice contemplated by applicable rules. As stated in the defendants' Proposed Order, in light of the magnitude of this case and in order to allow the defense sufficient notice to effectively prepare for trial, the Court should require the government to make the required disclosures under Rule 16(a) and Jencks/*Giglio* no later than sixty (60) days before trial. The Court should further require the government to provide notice of 404(b) evidence no later than February 15, 2016.

#### **A. The Government Should Disclose Any Remaining Rule 16(a) Material No Later Than Sixty (60) Days Before Trial**

Federal Rule of Criminal Procedure 16(a) requires the government to produce the categories of information subject to disclosure "[u]pon a defendant's request," not "seven

calendar days before trial” as proposed by the government. The government has repeatedly claimed to have disclosed Rule 16(a) materials as part of its initial July 17, 2015 production. *See, e.g.,* Gov’t’s Resp. to Mot. to Compel 3 (ECF No. 56). Accordingly, the defendants request an order directing the government to disclose any remaining Rule 16(a) material no later than sixty (60) days prior to trial.

**B. The Government Should Provide Notice Of Its Intent To Rely Upon Rule 404(b) Evidence No Later Than February 15, 2016**

The government also proposes serving notice under Federal Rule of Evidence 404(b) a mere seven days before trial. Rule 404(b) requires the government to provide “reasonable notice” of the general nature of any crime, wrong, or other act that the government intends to offer at trial. The government’s proposed schedule would leave the defendants a week to search 8.4 terabytes of data for mitigating evidence regarding past conduct, with potentially no prior notice from the government. Seven days would not allow the defendants to investigate public records, interview potential witnesses, or file motions to exclude evidence.

The Court acknowledged at the November 20, 2015 hearing that seven days is an inadequate amount of time to investigate Rule 404(b) evidence and file necessary motions. *See* Hr’g Tr. 27:4-7 (“February is probably the earliest we need to really put deadlines on 404(b) and allow for any motions to be filed and argued prior to trial so that we understand what’s going to happen in the trial itself.”). Other courts in this district have ordered the government to disclose Rule 404(b) evidence sixty (60) days prior to trial in cases with a large volume of evidence. *See, e.g., United States v. McDonnell*, No. 14-CR-12-JRS (E.D. Va. Mar. 19, 2014) (ECF No. 99-1). It is similarly appropriate here to modify the government’s proposed schedule to comply with Rule 404(b)’s requirement of “reasonable notice” in advance of trial. The defendants request

that the Court require the government to provide notice of Rule 404(b) evidence no later than February 15, 2016 as set forth in the attached Proposed Order.

**C. Jencks/Giglio Material Should Be Produced No Later Than Sixty (60) Days Before Trial**

The government's proposed order requires disclosure of Jencks and *Giglio* material five days before trial. While courts have not established a specific timeline for these disclosures, the Fourth Circuit has held that "there is no violation of a defendant's right to due process so long as the government discloses exculpatory and impeachment evidence to a defendant in time for its effective use at trial." *United States v. McCall*, No. 12-CR-351, 2013 U.S. Dist. LEXIS 75947, at \*8 (E.D. N.C. May 30, 2013) (quoting *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir. 1985)) (internal quotations omitted). Furthermore, "[n]othing in the Jencks Act prevents the government from voluntarily disclosing covered material prior to trial," and the Fourth Circuit "prefer[s] to encourage such early disclosure." *United States v. Lewis*, 35 F.3d 148, 151 (4th Cir. 1994). Such exculpatory evidence may require significant pre-trial investigation and review prior to trial. Disclosing these materials five days before trial would not allow the defendants time to adequately review and investigate the issues that arise in even the most basic cases involving minimal statements.

During the November 20, 2015 hearing, the Court asked the government to confirm that it has already produced *Brady*, *Giglio*, and Jencks material as part of the initial July 17, 2015 production. *See* Hr'g Tr. 30:24-31:2. The Court then contemplated a discovery schedule allowing the government to supplement these initial disclosures until February 2016. *See id.* at 31:2-4. In accordance with this exchange, the defendants respectfully request that the government be required to produce any *Giglio* and Jencks material not already produced as part of the initial production no later than sixty (60) calendar days before trial.

**D. Defendants Should Be Required to Produce Statements of Defense Witnesses Only In Accordance with Rule 16 and Rule 26.2**

The government's proposed discovery order would require that "no later than five calendar days prior to trial, the defendant, by and through his counsel, shall produce to the government the statements of any witness, other than the defendant, who will testify on behalf of the defendant." That proposed obligation far exceeds the requirements of Rule 16(b) (governing reciprocal discovery obligations), Rule 17(h), and Rule 26.2. *See, e.g., United States v. Osuji*, No. 3:06cr415, 2007 WL 4118386, at \*4 (W.D.N.C. Nov. 16, 2007) (denying government's request for pretrial disclosure of defense witness statements). In *Osuji*, the court stated:

The Government's request for disclosure of defense witness statements is premature. Rule 26.2 of the Federal Rules of Criminal Procedure provides that such statement must be produced only "[a]fter a witness . . . has testified on direct examination." Fed. R. Crim. P. 26.2(a). The Supreme Court has specifically recognized that Rule 26.2 does not authorize the pretrial discovery of an investigator's report. *See United States v. Nobles*, 422 U.S. 225, 235 n. 8 (1975). Indeed, Rule 16 specifically exempts such reports from pretrial disclosure. *See* Fed. R. Crim. P. 16(b)(2).

*Id.* Accord *United States v. Felt*, 502 F. Supp. 71, 73 (D.D.C. 1980) (denying government motion for pretrial production of defense witness statements and identifying the potential impact of requiring pretrial disclosure on the Sixth Amendment right to the effective assistance of counsel); *United States v. Kraselnick*, 702 F. Supp. 480, 488 (D.N.J. 1988) (denying government motion for pretrial production of defense witness statements).

The rules do not require the defendants to disclose their theories of the case to the government before trial through identification of witnesses. Nor do the rules require the government to be assisted by the defendants in the presentation of its opening statement and case in chief against those defendants. What is more, the government's proposal is not feasible in a case as relatively complex as this one. Among other things, the judgment of defense counsel

regarding potential witnesses will be affected and perhaps determined by the government's presentation during its case in chief. At the same time, the defendants recognize that the Court is likely to have case management concerns and that producing statements after direct examination of a witness in the defense case, if such testimony occurs, could create delays that are unacceptable to the Court. Accordingly, defendants have suggested language in our proposed order that is based on the language in Rule 16(b) regarding reciprocal disclosure of documents. See *Kraselnick*, 702 F. Supp. at 488 (“While it is the preferred practice that such production [of defense witness statements] take place earlier [before the conclusion the direct examination] so as not to disrupt the flow of the trial, the defendants cannot be asked to produce such statements until they have decided who will be called as witnesses for the defense.”); *Felt*, 502 F. Supp. at 73 (noting that requiring pretrial disclosure of defense witness statements “deprives the trial court of the proper factual context necessary to assess whether the requested statement, or a portion thereof, is ‘highly relevant to the critical issue of credibility’” (citing *Nobles*, 422 U.S. at 432)).

### **CONCLUSION**

For the foregoing reasons, the defendants respectfully request that the Court enter the attached Proposed Discovery Order.

Dated: December 4, 2015

Respectfully submitted,

/s/  
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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 4th day of December, 2015, a true and genuine copy of the foregoing document was sent via electronic mail by the Court's CM/ECF system to the following:

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\_\_\_\_\_/s/  
Karen D. Williams

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

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|------------------------------|---|------------------------|
| UNITED STATES OF AMERICA     | ) |                        |
|                              | ) | CRIMINAL NO. 1:15CR201 |
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| v.                           | ) |                        |
|                              | ) |                        |
| EDWIN STUART LIVINGSTON III, | ) |                        |
| RONALD JOSEPH TIPA,          | ) |                        |
| THOMAS EDWARD TAYLOR, and    | ) |                        |
| ROSS BERNARD DEBLOIS, SR.,   | ) |                        |
|                              | ) |                        |
| Defendants.                  | ) |                        |

**DISCOVERY ORDER**

Upon the motion of the defendants, by and through counsel, and upon reviewing the Proposed Order of the government, by and through its counsel, and in light of the entire record in this case, it is hereby,

**I. Discovery and Inspection**

**ORDERED** pursuant to FED. R. CRIM. P. 16(a), that no later than sixty (60) calendar days before trial, unless for good cause shown:

1. The government shall disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; recorded testimony of the defendant before a grand jury which relates to the offense charged; and the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to

interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial.

2. The government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

3. The government shall permit the defendant to inspect and copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

4. The government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

It is further ORDERED that on request of any defendant

5. The government shall disclose to the defendant no later than ten business days before trial, a written summary of testimony the government intends to use under Rules 702, 703, or 705, FEDERAL RULES OF EVIDENCE, at trial, unless the expert testimony is to be offered in response to a previously-noticed expert of a defendant, in which case the disclosure pursuant to this paragraph must be provided not later than five business days prior to trial. This summary shall describe the witnesses' opinions, the bases and reasons therefor, and the witnesses'

qualifications. In an appropriate case, and for good cause shown, either party may move the Court for an Order requesting earlier or later disclosure of expert witness notice and summaries.

It is **further ORDERED** pursuant to FED. R. CRIM. P. 16(b), that upon government compliance with the foregoing,

6. The defendant shall permit the government to inspect and copy or photograph books, papers, documents, data, photographs, tangible objects, or copies or portions thereof, which the defendant intends to use in the defendant's case-in-chief at trial.

7. The defendant shall permit the government to inspect and copy or photograph any results or reports of physical or mental examination and of scientific test or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends use in the defendant's case-in-chief at trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

8. The defendant shall disclose to the government no later than ten business days before trial, a written summary of testimony the defendant intends to use under Rules 702, 703, and 705, FEDERAL RULES OF EVIDENCE, as evidence at trial unless the expert testimony is to be offered in response to a previously-noticed expert of the government, in which case the disclosure pursuant to this paragraph must be provided not later than five business days prior to trial. This summary shall describe the witnesses' opinions, the bases and reasons therefor, and the witnesses' qualifications. In an appropriate case, and for good cause shown, either party may move the Court for an Order requesting earlier or later disclosure of expert witness notice and summaries.

**II. Federal Rule of Evidence 404(b)**

It is **further ORDERED** that, no later than February 15, 2016, the government shall provide notice to the defendant, in accordance with FED. R. EVID. 404(b), of the general nature of any evidence of other crimes, wrongs, or acts of defendant which it intends to introduce at trial, except that, upon motion of the government and for good cause shown, the court may excuse such pretrial notice.

**III. Brady Material**

It is **further ORDERED** that the government shall comply with its obligations to produce promptly exculpatory material as required by *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976).

**IV. Jencks/Giglio Materials**

It is **further ORDERED** that, no later than sixty (60) calendar days before trial, the government shall produce to the defendant the Jencks Act and *Giglio* materials for the witnesses who will testify in the government's case in chief.

Counsel for the defendant may disclose the contents of said Jencks Act and *Giglio* materials to his client, but may not provide his client with said documents or reproductions thereof.

At the request of the government and consistent with the ethical responsibilities of defense counsel, all Jencks Act, *Giglio* materials and reproductions thereof shall be returned to the United States Attorney's Office forthwith at the conclusion of the litigation of the case.

It is **further ORDERED** that immediately upon the close of the government's case in chief, the defendant, by and through his counsel, shall produce to the government the statements of any witness, other than the defendant, who the defendant intends to have testify on behalf of the defendant.

**V. Notice of Alibi**

It is **further ORDERED** pursuant to FED. R. CRIM. P. 12.1 that, no later than 20 calendar days before trial, the defendant, by and through counsel, shall comply with Rule 12.1(a) if the defendant intends to offer a defense of alibi, and further that the defendant and the government shall comply with Rules 12.1(b) and (c) within the time period set out in those rules, except upon motion of the parties and for good cause shown.

**VI. Stipulations**

It is **further ORDERED** that the parties shall file proposed stipulations with the Court no later than three business days before trial. Additional stipulations may be submitted thereafter by the parties upon approval by the Court.

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The Honorable Liam O'Grady  
United States District Judge

Date: \_\_\_\_\_  
Alexandria, Virginia